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What is the Harm Principle For?

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John Stanton-Ife[1]

Abstract

In their excellent monograph, *Crimes, Harms and Wrongs,* Andrew Simester and Andreas von Hirsch argue for an account of legitimate criminalisation based on wrongfulness, the Harm Principle and the Offence Principle, while they reject an independent anti-paternalism principle. To put it at its simplest my aim in the present paper is to examine the relationship between 'the harms' and 'the wrongs' of the authors' title.

I begin by comparing the authors' version of the Harm and Offence Principle with some other influential accounts. After examining the (considerable) role wrongfulness plays in their work, I ask what there is left for their Harm and Offence Principles to do. In the light of the understanding and foundations of the Harm and Offence Principles proposed by the authors, I suggest that the answer is little or nothing. The wrongfulness constraint the authors place on their Offence Principle comes close to swallowing it up entirely. Furthermore the part of their Offence Principle that is not thus swallowed by wrongfulness leaves the account with a commitment that is probably best dropped. As far as their Harm Principle is concerned I suggest that the authors' account of 'harm' is so broad that it lacks the resources to distinguish harm-based reasons from wrongfulness- or immorality-based reasons in any principled way. Among other things, I ask in this context, first, whether one can be harmed as one's character deteriorates and, secondly, whether one is harmed by virtue of the serious wrong one does to another.

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Keywords Criminalisation, Harm, Harm Principle, Offence Principle, wrongfulness, paternalism, legal moralism

I. Introduction

Much of Andrew Simester and Andreas von Hirsch's account of legitimate criminalisation is, as we will see, consistent with legal moralism. They are not Legal Moralists, however, and the vindication of the rival Harm Principle together with a semi-independent Offence Principle is one of the main aims of their fine monograph, *Crimes, Harms and Wrongs*.[2] The question on which I propose to focus is what arguments, what grounds, do they have for rejecting legal moralism, despite the consistency at many points of their views with that position. On what basis in short do they endorse the Harm and Offence Principles? What would their account lose if they dropped their insistence on either or both? The authors' recent work provides a good opportunity to examine the place of the Harm and Offence Principles in philosophical thinking about legitimate criminalisation. One thing that is not in doubt is the importance and high quality of the work. It is a mine of sustained, powerful, imaginative argument about various aspects of criminalisation. Everyone interested in the question of what makes criminalisation legitimate will need to be familiar with it. However, I will try to explain why I find it difficult to accept the argument or the reasoning that leads them to endorse the Harm and Offence Principles. As far as their defence of the Offence Principle is concerned, I will suggest that its stress on the normative, by way of comparison with Feinberg's Offence Principle, comes close to making the idea of offence itself otiose. Moreover, the role their Offence Principle leaves for offence itself may be a questionable one. The sort of work it is important for the Offence Principle to do may be better done, I suggest, by the wrongfulness constraint, a constraint that is also endorsed by the authors. As far as the Harm Principle is concerned, the authors' theory of criminalisation as it stands seems to me to lack an account of harm with the cutting edge needed to separate what on its own terms is the wheat of harm-based justification from the chaff of immorality or wrongfulness-based justification. My aim here is to suggest that not enough has been done to establish a convincing case for the Harm Principle. I do not make the stronger claim that it would be impossible in principle for the authors or anyone else to make out such a case. Finally, I will suggest that in any case the authors' account holds up surprisingly well without the Harm and Offence Principles, despite the centrality of those principles to their argument.

[2] Andrew Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*, Oxford, Hart (2011). Citations from this work will appear in the text.

II. The Harm Principle: Scope and Derivation

The Harm Principle in the form we now know it originates with John Stuart Mill's *On Liberty*. Mill summarises his argument in a famous paragraph which included the words 'The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'[3] Plainly the principle applies to the coercive use of the criminal law, even if the scope of the principle was intended by Mill to range more widely.[4] My concern will not be with Mill's version of the Harm Principle as such, but I will begin by considering two aspects of it as prelude to an examination of Simester and von Hirsch's version. First I say something about the scope of Mill's principle, focussing in particular on what it rules out. Secondly I consider briefly the foundations or the derivation of Mill's principle.

The scope of Mill's Harm Principle, at least in its canonical formulation, differs from that of Simester and von Hirsch.[5] Mill's principle rules out criminalisation (1) to prevent immoral conduct; (2) to prevent offensive conduct; and (3) to prevent conduct on paternalist grounds, that is conduct which, although possibly harmful, is harmful only to the coerced or criminalised person him- or herself. Legitimate criminalisation, in short, on Mill's canonical formulation, necessarily requires harm to others. Since Mill wrote, the Harm Principle has been supported by an impressive collection of liberal thinkers, most notably H.L.A Hart, Joel Feinberg and Joseph Raz.[6] These writers all modify Mill's principle in various ways. Feinberg for one argued that Mill's principle, rather than excluding offence as a ground for legitimate criminalisation, ought to be supplemented with it, allowing criminalisation in suitable circumstances on the basis of offensive, rather than harmful, conduct.[7] Simester and von Hirsch take a view on offence *qua* ground for legitimate criminalisation that appears to lie in between Mill's outright rejection of it and Feinberg's embrace of it. The authors agree with Feinberg that the Harm Principle ought to be supplemented by an Offence Principle, but they do not accept that the Offence Principle can, so to speak, entirely go it alone (91-138). In other words, they

[3] The edition of Mill to which I have referred is John Stuart Mill, *On Liberty and Other Essays*, Oxford University Press, World's Classics Edition (1991). However, when citing *On Liberty* I will follow the now common practice of citing the relevant chapter and paragraph number, so it does not matter which of the many editions of the work is consulted. The quoted words above are from Chapter 1, paragraph 9.

[4] Mill states that the principle is (also) to apply to 'legal penalties' in general and to the 'moral coercion of public opinion.' *On Liberty,* Chapter 1, paragraph 9.

[5] Unless otherwise indicated when discussing 'Mill's principle,' I am referring to the canonical formulation of it he makes himself in Chapter 1, paragraph 9 of *On Liberty*. Possibly Mill's argument in *On Liberty* as a whole or in his philosophy more widely may support a broader principle than the one he himself formulates, but I shall not consider that complex and interesting question here.

[6] H.L.A Hart, *Law, Liberty and Morality*, Oxford University Press (1963); Joel Feinberg, *The Moral Limits of the Criminal Law*, 4 volumes (1) *Harm to Others* (1984); (2) *Offense to Others* (1985); (3) *Harm to Self* (1986); (4) *Harmless Wrongdoing* (1990), all Oxford University Press; Joseph Raz, *The Morality of Freedom*, Oxford University Press (1986).

[7] Feinberg, *Offense to Others* (1985).

believe, offensive conduct that is in no way harmful, cannot ground legitimate criminalisation, but the logic of what they take to be legitimate offence-based criminalisation differs from harm-based criminalisation to such an extent that we do better, they think, to adopt a separate Offence Principle. Moreover, they argue, the presence of the right sort of offence rationale allows a loosening of the constraints that apply even to criminalisation on the basis of the Harm Principle in isolation. I say more about the authors' views on offence below.

A second example of a significant modification of Mill's Harm Principle on the part of his successor liberal thinkers concerns paternalism. Mill's canonical formulation of the Harm Principle as we have said rules out paternalistic criminalisation. Strictly speaking, Mill's is a 'Harm *to Others* Principle' rather than simply a 'Harm Principle.' Joseph Raz's Harm Principle by contrast is shorn of the words 'to others.' Raz argues that while liberals are often right in specific cases to oppose paternalism, it should not be ruled out in general or in formulating the Harm Principle. 'Reflection,' he wrote, 'on the impact of paternalism on autonomy shows that it varies to a degree which makes it senseless to formulate either a general pro- or a general anti-paternalistic conclusion.'[8] Simester and von Hirsch's view corresponds with Raz's here, not with Mill's. According to them, there is 'no knock-down general objection that rules out legal paternalism.'(143) By way of contrast with Mill, then, the authors' Harm Principle does not rule out paternalism and rather than reject offence as a basis for legitimate criminalisation, it is allowed by them a significant role. Hence of Mill's 'excluded grounds' mentioned above, namely criminalisation (1) to prevent immoral conduct, (2) to prevent offensive conduct and (3) to prevent conduct on paternalist grounds, Simester and von Hirsch only straightforwardly agree with Mill on ground (1), that criminalisation for the sake of the prevention of immoral or wrongful conduct as such should in principle be excluded.

The *foundation* or the *derivation* of Mill's Harm Principle also differs from Simester and von Hirsch's. Mill's principle was based on utilitarian foundations. The form of utilitarianism in question was plainly indirect.[9] Utility, Mill emphasised, was regarded by him 'as the ultimate appeal on all ethical questions.[10] It did not, that is, take the utilitarian mantras to 'maximise happiness' and 'minimise unhappiness' as action-guiding principles for legislators to follow when criminalising behaviour. For if a state were to determine what conduct to criminalise on the basis of what it took to minimise unhappiness, the Harm Principle would be compromised, even nullified, as soon as one could find examples of immoral, offensive or self-harming conduct which, if criminalised, could be expected to minimise unhappiness to a greater extent than would be possible without criminalisation. The short-term utilitarian gains for example to be had by criminalising conduct that offends many but is engaged in by few may be very great indeed. For all that, Mill's principle rules out criminalisation in such a case. The forsaken utilitarian gains would be more than compensated for by the long-term,

[8] Joseph Raz, *The Morality of Freedom*, Oxford (1986), 422.
[9] On indirect utilitarianism see John Gray, *Mill on Liberty: A Defence*, Routledge; 2nd edition (1996).
[10] *On Liberty*, Chapter 1, paragraph 11.

'ultimate' utilitarian gains of keeping faith with the Harm Principle, however the derivation is to work in detail, possibly along the lines of a version of rule-utilitarianism.

While there are still a number of sophisticated defenders of the Harm Principle who like Mill defend its utilitarian foundations,[11] it is probably more common today for defenders of the Harm Principle to eschew utilitarianism. Raz for example supports the Harm Principle on the basis of his perfectionist liberalism, centering on the value of autonomy and what he describes as 'an essentially Aristotelian account of well-being.'[12] 'Perfectionism,' as Raz uses it, is a term used to indicate that 'there is no fundamental principled inhibition on governments acting for *any* valid moral reason.'[13] 'It makes no sense,' according to Raz, 'to say of a state of affairs that it is good but that fact is no reason to do anything about it.'[14] And that goes for governments and legislators just as much as it goes for ordinary individuals. Presumably one can equally say that it does not make sense to say of a state of affairs that it is bad but that fact is no reason to do anything about it (for individuals or legislators). Based on what has been said so far, therefore, Raz's view if anything seems to *support* the view that immorality or moral wrongness, self-harm and possibly offence are valid reasons *of some sort* for criminalisation, albeit subject to defeat in various ways. If it makes no sense to say that the wrongfulness or offensiveness of conduct provides no reason for anyone or any entity including legislatures to do anything about it, one cannot (yet) exclude the possibility that criminalisation may be the best available way to respond.

Raz's endorsement of the Harm Principle must, as he is aware, be supported on some other basis. He finds such support by reflecting on the *means* that can legitimately be adopted in promoting the well-being of people and in pursuit of moral ideals.[15] The means used in criminalisation are primarily forms of coercive interference, most notably imprisonment and the threat of it, and such interference, he emphasises, violates the autonomy of the persons coerced. 'Coercion,' he argues 'is a global and indiscriminate invasion of autonomy.' It also expresses 'a relation of domination and an attitude of disrespect for the coerced individual.' [16] The autonomy-violating aspects of coercion are especially significant for Raz since his understanding of harm is in terms of autonomy or, rather, of setbacks to it.[17] It is on this basis, Raz believes, that the Harm Principle is to be vindicated. The coercive, autonomy-violating means involved in criminalisation furnish strong reasons against criminalisation which, he argues, can only be defeated by stronger autonomy-based reasons. That is where the Harm Principle comes in. Ruling out absolutely all criminalisation in cases where there is no harm to be prevented is the best route to ensuring that the autonomy setbacks involved in

[11] For example L.W. Sumner, *The Hateful and the Obscene,* University of Toronto Press (2004).
[12] Joseph Raz, 'Facing up: A Reply,' 62 *Southern California Law Review* (1989), 1153, at 1227.
[13] Raz, 'Facing up,' 1230. Emphasis added.
[14] Raz, 'Facing up,' 1230.
[15] Raz, *The Morality of Freedom*, 420.
[16] Raz, *The Morality of Freedom*, 418.
[17] Raz, *The Morality of Freedom*, 412-420.

criminalisation are offset by strong enough gains in autonomy for persons in general. Or so Raz argues.[18]

Simester and von Hirsch's Harm Principle is not based, like Mill's, on utilitarianism. Rather than 'forgo' in Mill's famous words 'any advantage which could be derived to [their] argument from the idea of abstract right, as a thing independent of utility,'[19] the authors promise a 'principled account that accommodates both deontological and consequentialist values'(18). It certainly appears at various points of the book that Razian perfectionism or something akin to it is underlying their view. In discussing paternalism for example they make a point very much on all fours with Raz's understanding of perfectionism.[20]

> Like any intervener the state should act morally, i.e. for good reasons. Assuming one is not a thoroughgoing moral sceptic (and criminal lawyers cannot be), that something is morally good supplies a prima facie reason to promote its realisation. Conversely, that something is bad supplies a prima facie reason to avoid its occurrence. This isn't controversial; or at any rate, it shouldn't be, since it is inherent in the very idea of morality. *Any* agent ought to do good and avoid bad, and the state is an agent too. To be sure, it is a fallible agent, as are we all. And sometimes—frequently—it should not intervene. But this does not mean that it should never act at all (143-144).

This quotation as already intimated appears in the context of the authors' argument that the Harm Principle should not be formulated so as to exclude criminalisation on paternalist grounds as a matter of principle. That someone may harm themselves gives the state *some* reason to intervene, indeed

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[18] I explore Raz's arguments in detail in John Stanton-Ife, "The Limits of Law," *The Stanford Encyclopedia of Philosophy* (Winter 2008 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/win2008/entries/law-limits/>. In short I doubt whether the damage that coercion does or may do to autonomy is a strong enough consideration to override in all cases the reasons that immorality or wrongfulness *ex hypothesi* give the legislator—and I doubt therefore that it is a strong enough consideration to vindicate the Harm Principle. On Raz's first point mentioned in the text, the coercive aspect of criminalisation can indeed be a 'global and indiscriminate invasion of autonomy' but it need not be. For one thing, criminal punishment often does not involve imprisonment. It can involve fines, community service orders and electronic tagging orders. Moreover the criminal law can often successfully coerce persons without setting back their autonomy. Someone who, say, refrains from stealing simply because he wants to run not the slightest risk of being imprisoned has been coerced, but no damage has been done to his autonomy in the Razian sense. That is, the range of valuable options from which he has to choose is no less adequate than it would have been had theft not been made into an imprisonable crime (cf. Donald Regan, 'Authority and Value: Reflections on Raz's *Morality of Freedom*' 62 Southern California Law Review, 1988-89, 995, 1082). As far as Raz's second point mentioned in the text is concerned, coercion may indeed 'express a relation of domination and an attitude of disrespect for the coerced individual.' And that consideration indeed points to the high importance of strong justification for the use of coercion in criminalisation and elsewhere. However, it does not seem to show any reason for discriminating between otherwise valid reasons based on wrongdoing or immorality (which purportedly run afoul of the Harm Principle), and otherwise valid reasons based on harm, paternalistically or otherwise (which purportedly do not run afoul of the Harm Principle).

[19] Mill, *On Liberty*, Chapter 1, paragraph 11.

[20] I say 'on all fours with Raz's perfectionism.' This might be overcautious. The authors often cite Raz with approval and perhaps take it to be obvious they are adopting his position. Raz is in fact cited in the very footnote attached to this passage quoted in the text above, but the citation is not to Raz's perfectionism, but to his notion of 'exclusionary reasons.'

some reason to criminalise, albeit one that is very often subject to defeat. The authors cite many contexts in which they believe such defeat is exactly the right result (141-186). Although I do not think they say so explicitly, they are presumably committed to saying the same thing about bare immorality.[21] From the fact that conduct is immoral the state also has in the first instance a reason to counter it and maybe criminalise it. For as we saw in the passage quoted above the authors say 'that something is bad supplies [for any agent, the state included] a prima facie reason to avoid its occurrence.' This means that some account will be necessary as to how the Harm Principle is to get a footing on Simester and von Hirsch's account, given their conclusion that wrongfulness or immorality cannot as a matter of principle serve as a legitimating ground for criminalisation in the absence of harm. We examine the authors' Harm Principle in section V below. For now we should note that as far as the derivation or grounding of the Harm Principle is concerned, Simester and von Hirsch appear far closer to the liberal perfectionism of Raz than to the utilitarianism that formed the original grounding of the Harm Principle, a point to which I will return.

III. Wrongfulness

Mill's canonical formulation of his Harm Principle contains no explicit mention of wrongfulness. He does not qualify his claim that the only purpose for which a state can rightfully criminalise conduct is 'to prevent harm to others,' by adding that the harm in question must also be wrongful. It might be tempting to respond, 'well of course not: a large part of the point of his Harm Principle is that the simple reliance on the wrongfulness or immorality of conduct for the purposes of criminalising that conduct is to be ruled out.' However, that would not be an apt response. For it is also clear that Mill's Principle makes the presence of harm into a necessary condition for criminalisation, not a sufficient one. In other words while criminalisation for Mill does of course require harm, merely establishing the presence of such harm does not yet legitimate it. More is required which opens up the possibility that wrongfulness is *also* necessary for legitimate criminalisation, even if not sufficient. It is clear that for Mill the 'extra' that is needed for legitimate criminalisation on top of harm is the familiar utilitarian idea that a better balance of benefits over costs can be secured by it in a given case than by

[21] But there is no ground for saying they are thus committed if 'immorality' is understood as 'bare immorality' understood simply as 'conventional immorality,' a view sometimes associated with Lord Devlin (P. Devlin, *The Enforcement of Morals*. Oxford University Press, 1965). For, as Hart and others have shown, conventional immorality may fail to give good reasons for states or individuals in the first place: H.L.A Hart, *Law, Liberty and Morality*, Oxford University Press (1963). For that matter Legal Moralism is also best understood in a way that avoids understanding immorality or wrongfulness as purely conventional. Simester and von Hirsch's position, appears then to be that bare immorality and wrongfulness can, as in Raz's account, count as good reasons for states as well as individuals in the first instance, provided they are genuinely wrongful or immoral. It is then for the Harm Principle to rule these reasons out further down the line.

non-criminalisation.[22] A large variety of factors could form a part of any such utilitarian calculation, not excluding a (derived) constraint of wrongfulness. I will not stop to consider that possibility here. Feinberg certainly concluded that a Harm Principle true to the spirit if not the letter of Mill must also build in such a clause requiring that the harm in question must be wrongful. A shop owner may for example be severely harmed by being driven out of business, but if that is the result of someone else setting up a more successful business, this harm would not be wrongful and so not the right sort of harm to trigger the Harm Principle.[23]

Simester and von Hirsch likewise believe that the Harm Principle must contain a wrongfulness constraint. Helpfully they condense their views on the place of wrongfulness into three theses. As we will see, at least two of them are ecumenical so far as any debate between proponents of the Harm Principle, on the one hand, and Legal Moralists on the other are concerned.

1. That Φing is wrongful is necessary to justify its criminalisation (Necessity Thesis)
2. That Φing is wrongful is insufficient to justify its criminalisation (Insufficiency Thesis)
3. That Φing is wrongful is insufficient to establish even a *pro tanto* ground for its criminalisation (Non-qualifying Thesis).

Let us examine each in turn.

As far as the Necessity Thesis is concerned, the authors tell us that it is most easily defended by reference to the distinctive nature of the criminal law, which punishes and censures offenders for their conduct (23). The criminal law *blames* people and 'one cannot blame a person unless that person does something morally wrong; that is, unless she does something that, all-things-considered, she ought not to do (23). By criminalising the activity of Φing, say the authors:

> the state declares that Φing is morally wrongful; it instructs citizens not to Φ; it warns them that, if they Φ, they are liable to be convicted and punished within specific ranges (the levels of which signify the seriousness with which Φing is regarded); and, further, the state undertakes that, on proof of D's Φing, it will impose an appropriate measure of punishment, within the specified range, that reflects the blameworthiness of D's conduct.

The authors think (and I agree) that this account captures both a way in which criminalisation actually (often) occurs and is an 'archetype' of how it ought to occur. The authors' archetype has a dual structure. Criminalisation, according to it, has both a conditional and a categorical dimension,

[22] See L.W. Sumner, 'Criminalizing Expression: Hate Speech and Obscenity,' in John Deigh and David Dolinko, *The Oxford Handbook of the Philosophy of Law* (Oxford: 2011) 17-36, at 20.
[23] Feinberg, *Harm to Others* (1984).

respectively, 'don't Φ or else' and 'just don't Φ.'[24] One needs the second because criminalisation does not merely amount to a request. It is also not what Phillip Pettit calls 'admission cost regulation,'[25] that is, the regulation of Φing in effect by charging actors for the right to perform the action. Taxation and criminalisation, were one to understand both as forms of admission cost regulation, are not so much different in kind as in degree, the former imposing costs on the pocket, the latter imposing costs beyond the pocket to loss of liberty (or where there is capital punishment, life). It is, however, quite implausible to understand the criminal law in this way: Simester and von Hirsch are right to lay the emphasis where they do. The message of the law of murder for example is that it is forbidden, not that, or not merely that, it is going to be extremely costly to murder someone.

Placing moral wrongfulness and blame at the centre of a characterisation of criminalisation, as do Simester and von Hirsch, is to argue for a moralised view of the criminal law as opposed to a non-moralised view, as for example admission cost regulation. This, as I have just suggested, is highly plausible. Immediately after sketching their archetype, the authors, however, assert that it contains, '*the features* that can make criminalisation morally legitimate.'(7)[26] Now I am not sure whether this claim ought to be taken literally in the unqualified form in which it is made, for it is plainly a claim that anticipates further argument in the book as a whole. If taken literally, it is an overstatement given the view the authors defend that a key feature necessary for making criminalisation morally legitimate is the Harm Principle. Their archetype of criminalisation does not, without more, imply that the blame responses inherent in the criminal law based on wrongdoing can be applied *only* to what is also harmful. How would the archetype have such a discriminating mechanism built into it? The Harm Principle requires some altogether independent argument. Plausible as their archetype is as a characterisation of criminalisation, it does not therefore do anything to support the Harm Principle, whether or not the authors mean it to. The point is worth making since I will eventually be asking what ultimately justifies the endorsement of the Harm Principle in the authors' account and the rejection of legal moralism.

The authors' second thesis about wrongfulness, the Insufficiency Thesis—that Φing is wrongful is insufficient to justify its criminalisation—is also to my mind correct. I have myself

[24] On the categorical dimension, compare Stephen Darwall, 'Criminal law is structurally analogous to the "moral law"; it creates obligations that are analogous to moral obligations *period*.' *Morality, Authority and Law: Essays in Second-Personal Ethics,* Oxford University Press (2013), xvi; see also in the same volume, 'Law and the Second Person Standpoint,' 168-178.

[25] Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, Cambridge University Press (2012) 118.

[26] Emphasis added.

asserted the same thing.[27] It is also one that would be shared with any legal moralist. For even a legal moralist who believes that the wrongfulness of an activity is a strong reason for criminalising it will accept that there may be many kinds of reasons that could yet defeat the case for its criminalisation. Michael Moore for one would accept this point. His version of legal moralism is a particularly strong one, according to which the function of the criminal law is to achieve retributive justice by punishing '*all* and only those who are morally culpable in the doing of some morally wrongful action.'[28] Nevertheless in a given instance, it may not be right to criminalise the activity all-things-considered. One sort of case, according to Moore, is conduct which, as experience teaches us, will be engaged in inevitably whether or not the law intervenes:

> ..for behaviour that will be engaged in anyway even if legislated against, there will be a peculiar effect of prohibition, namely the raising of the prices of the products or services necessary for such behaviour; this, in turn, may increase the profits of supplying such services or products, which in turn sustains organized criminal activities. This is typically known as the 'crime tariff'. Prostitution, for example, does not go away by being legislated against, as the experience of all societies has shown. By making it criminal, however, the supply is artificially restricted to those willing to engage in criminal behaviour, so that prices and profits are such as to draw in organized criminal activity.[29]

For the sake of argument, let us accept that prostitution is morally wrongful. Doing so does not on Moore's account establish that prostitution ought to be criminalised because that fails to take account of the new problems that criminalisation may cause in this context. The best solution on this understanding, that the wrongful activity ceases or is significantly curtailed, may be out of reach. The legal moralist might then conclude that the second best solution—which may be to do nothing—is preferable to the third best in which underground highly exploitative gangs can flourish as a result of the criminalisation of the activity.

Again some legal moralists in some contexts may insist that one should not only do the right thing, but that one should do the right thing for the right reason. Plainly coercing someone into doing the right thing, whatever else there may be to say in its favour, does not lead to their doing the right thing for the right reason in the short-term and is probably unlikely to in the long-term. Again wrongfulness may be insufficient if the cost is too high in terms of the rule of law[30] The authors in their penultimate chapter have a fine discussion of many of the pertinent features supporting the

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[27] '[E]veryone agrees that the immorality of an action is not a sufficient reason for state coercion,' Stanton-Ife, 'The Limits of the Law,'The Stanford Encyclopedia of Philosophy (Winter 2008 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/win2008/entries/law-limits.

[28] Michael S. Moore, *Placing Blame*, Oxford University Press (1997), 35. Emphasis added.

[29] Michael S. Moore, *Placing Blame*, Oxford University Press (1997), 664.

[30] For a recent treatment of the rule of law that among other things develops the classical account of Lon Fuller, see Mathew Kramer, *Objectivity and the Rule of Law*, Cambridge University Press (2007).

Insufficiency claim, the practical constraints, regulatory alternatives, rule of law and other values such as privacy that may defeat the case for criminalising Φing even where Φing is wrongful.

The Insufficiency Thesis also leaves room for the Harm Principle if strong enough support turns out to exist for it. As I have already stated more than once and will say again below, the authors themselves endorse the Harm Principle. It is interesting to note that Moore cites potential damage to liberty as one possible reason militating against criminalising wrongdoing.[31] If, according to Moore from his legal moralist perspective, the wrongful behaviour can be criminalised only at a sufficiently high cost to liberty, it may be best all-things-considered not to criminalise. This remains, however, a factor—albeit sometimes a very strong factor—that is to be weighed on the scales when considering whether criminalisation is the best option all-things-considered. The title of Mill's great work introducing the Harm Principle is of course *On Liberty* and Mill clearly saw the importance of liberty as crucial support for the Harm Principle. The difference between Moore and the proponent of the Harm Principle here is over the strength or weight that liberty is to have in any decision whether or not to criminalise the relevant conduct. It has the absolute strength of a side-constraint for the proponent of the Harm Principle and thus is not to be put on the scales at all and weighed against reasons based on pure wrongfulness or immorality. For the Legal Moralist, by contrast, the fact that it lacks this absolute strength does not preclude it from having considerable, even conclusive, strength in a given context.

The kinds of reasons or considerations that militate against criminalising even wrongful conduct are many and various and those listed above certainly do not constitute an exhaustive list. I have been emphasising the point that, as with the Necessity Thesis, the Insufficiency Thesis is a commitment of the legal moralists as well as those proponents of the Harm Principle who like the authors support it or an equivalent claim. It will be useful to refer to this group of considerations as *ecumenical defeaters* or *defeaters* for short. One might incidentally be tempted to suggest that between them the Necessity Thesis and the Insufficiency Thesis are themselves enough to account for the core claims of legal moralism, while plainly a great deal of detail would be needed filling in the implications. Many legal moralists, however, would reject the suggestion that legal moralism is made up only of these two theses, however applied and worked out in detail. There may be other considerations important enough to count as a core commitment at the same level as the Necessity and Insufficiency claims. For Antony Duff and Sandra Marshall, for example, the idea that crimes are *public* wrongs has to be recognised as a core commitment of legal moralism and accordingly must itself furnish a constraint on criminalisation or at least must significantly qualify the wrongfulness

[31] Michael S. Moore, 'Freedom,' *Harvard Journal of Law and Public Policy*, Vol. 29 (2005), 9.

constraint.[32] While a person's life might be devastated by the betrayal of his spouse, to cite one of Duff and Marshall's examples, this is not in itself any concern for the criminal law.

While the authors' Insufficiency and Necessity Theses seem to me to be both clear and correct, I am much less sure about their third—'Non-Qualifying'—Thesis about the role of wrongfulness in criminalisation. I turn to the Non-Qualifying Thesis now. Stating that the thesis is 'correct,' the authors as we have seen formulate it thus: 'That Φing is wrongful is insufficient to establish even a pro tanto ground for criminalisation.' Though they formulate the claim in terms of *pro tanto* grounds, when they come to discuss and defend it (29), they speak instead in terms of *prima facie* grounds or reasons, but I shall assume the change in terminology is not intended to mark any change in meaning. I will assume, that is, that the authors mean *pro tanto* and *prima facie* to be synonymous.[33] The idea of a *pro tanto* ground or reason or obligation is designed to deal with contexts in which there may be a plurality of relevant factors, obligations or reasons and so on. *Pro tanto* obligations or reasons are genuine obligations or reasons but they may need to yield to other factors in particular cases. They are genuine in the sense that even if defeated in a given case, they still have a normative pull or leave some remainder: if, say, I broke a promise to someone because I needed to help out in an emergency, I still owe an apology or at least an explanation to the person to whom I broke the promise.

I believe there is evidence in the authors' discussion of their Non-Qualifying Thesis for two rather different claims. The difference between them is significant, since one of them would be rejected by all legal moralists while the other one most, if not all, legal moralists would, I think, happily live with. To see this, let us begin by repeating the thesis:

> **Non-qualifying Thesis**: That Φing is wrongful is insufficient to establish even a *pro tanto* ground for criminalisation.

This seems to imply:

[32] See for example R.A Duff and S.E. Marshall, 'Public and Private Wrongs,' in James Chalmers, Fiona Leverick and Lindsey Farmer (eds.) *Essays in Criminal Law in Honour of Sir Gerald Gordon*, Edinburgh University Press (2010).

[33] Some have thought the distinction between *prima facie* and *pro tanto* important in certain contexts, e.g., Susan Hurley, *Natural Reasons,* Oxford, (1989), 125-138; Simon Blackburn explains (in the context of *prima facie* obligations rather than reasons): 'The term *prima facie* can suggest a merely epistemological worry, as if on second appearance, or further thought, the obligation turned out to be illusory' (Simon Blackburn, *Oxford Dictionary of Philosophy* Oxford, 1994, 301). Simester and von Hirsch, I take it, do not mean to suggest that the wrongfulness of which they speak may turn out to be illusory. The idea is that the wrongfulness may be defeated or overridden, not that it is a mirage that can mislead until one looks really hard at the phenomena. Blackburn continues, 'A more modern usage prefers the title "*pro tanto* obligation": an obligation inasmuch as there is this or that aspect of the situation, but again suspending the all-in verdict.' I shall therefore assume that when they say *prima facie*, they mean *pro tanto* on the understanding just described.

> **Non-qualifying Thesis A** That *any kind* of Φing is wrongful is insufficient to establish even a *pro tanto* ground for criminalisation.

However, soon after introducing their thesis, the authors add the words 'only certain kinds of wrongfulness qualify. Something extra is needed.'(29) This suggests a different interpretation:

> **Non-qualifying Thesis B** There exist wrongful Φings whose wrongfulness is insufficient to establish even a *pro tanto* ground for criminalisation.

It is hard to imagine any legal moralist endorsing Non-qualifying Thesis A. For how could they accept that *no* kind of wrongful Φing is *even* a reason (possibly subject to defeat) for criminalising the Φing in question? Not even murder or rape! It is on the other hand easy to see how a legal moralist may accept Non-Qualifying Thesis B. As mentioned above Duff and Marshall argue that *private* wrongs are not the business of the criminal law and so constitute no reason to criminalise.[34] Grant Lamond, who says that his account may be 'a very narrow form of legal moralism' suggests that only moral wrongs that ought to be punished should be criminalised.[35] And there may be other means of truncating the range of wrongs that get to the legal moralist's starting post for assessment as potential crimes. Importantly, Non-qualifying Thesis B also implies (unlike Thesis A) that the following variant is not ruled out:

> **Non-qualifying Thesis B*** There exist wrongful Φings whose wrongfulness *is* sufficient to establish a *pro tanto* ground for criminalisation.

Accordingly, on this idea, the wrongfulness of murder and rape for example are highly likely to be sufficient *pro tanto* grounds for criminalisation, indeed grounds that in the event are unlikely in the extreme to be defeated by any combination of the considerations we considered in our discussion of the Insufficiency Thesis.

I am not entirely sure whether the authors mean to endorse Non-qualifying Thesis A or Non-qualifying Thesis B. The former, stronger interpretation is supported by the fact that they discuss the thesis under the heading 'Mere Immorality' and state that according to their thesis 'immorality *per se* does not generate even a prima facie reason to prohibit.' (29) This suggests that they mean the thesis to be a shot across the bows of legal moralists in general and, as I have suggested above, it is that only on the first, stronger interpretation of the thesis. The weaker interpretation leaves the legal moralist with Thesis B* intact and consistent with a potentially large range of wrongs that are themselves

[34] Duff and Marshall, 'Public and Private Wrongs.'
[35] Grant Lamond, What is a Crime? (2007) 27 *Oxford Journal of Legal Studies*, 609.

reasons for criminalisation. They also describe their thesis as 'a much stronger version of the Insufficiency Thesis' (29), which it would hardly be if its function were merely to leave room for the Harm Principle, a job the Insufficiency Thesis has already done. On the other hand, as we have mentioned, the weaker Thesis B is supported by the authors' suggestion that 'only certain kinds of wrongfulness qualify' as *prima facie* reasons for prohibition. It must be admitted that this suggestion is only fleetingly made by the authors, while most of the discussion of their Non-qualifying Thesis is taken up with showing how it leaves room for the Harm Principle (29-30). It is enough, though, to leave one wondering where their precise intentions lie.

If they do mean to endorse the stronger thesis, A, that no variety of wrongfulness can ever be a reason for criminalisation, subject only to what I called the 'defeaters' of the Insufficiency Thesis, this must be reconciled with their support for the Necessity Thesis. In other words how on this assumption is the putative non-reason-giving nature of any wrongfulness to be squared with the requirement for wrongfulness in the justification of criminalising conduct? Presumably the way this can be done is by means of the distinction between *condition*, on the one hand, and *object*, on the other. Moral wrongfulness could accordingly be understood as a condition of criminalisation, rather than as the object or part of its object.[36] This would do the trick of keeping the (strong) Non-qualifying Thesis consistent with the Necessity Thesis; wrongfulness would remain necessary to the justification of criminalisation. The view would hold that while conviction of a crime should only befall a (blameworthy) wrongdoer, the wrongfulness of what has been done is no positive reason at all for its criminalisation, which must be based on some other factor, such as its harmfulness.

While this is a possible position to take, if it is the authors' view of the place of wrongfulness, it still remains far too hard as I see it to reconcile it with a lot of other things they say. To put it at its starkest, I cannot see how the authors can consistently say that the wrongfulness of rape or murder is *no* positive reason, not even a reason subject to potential defeat, for its criminalisation. It is true enough of course that the Harm Principle, waiting as it is in the wings for the authors, will be well placed to justify the criminalisation of murder and rape, so the position under consideration would not lead to absurd consequences.[37] As we have seen, however, the authors' account of the nature of

[36] On this distinction see R.A. Duff, *Answering for Crime* Oxford, Hart, (2007), 82.

[37] Of course one difficulty in assessing the relative roles of wrongfulness and harm in the criminalisation of conduct is that the best known crimes, such as murder and rape, will on the understanding of most people always be *both* wrongful and harmful. But see the well-known essay by John Gardner and Stephen Shute, 'The Wrongness of Rape,' in John Gardner, *Offences and Defences*, Oxford University Press (2007), in which Gardner and Shute try to isolate a case of harmless wrongdoing that they call 'the pure case of rape,' a rape on a drugged and unconscious victim who never discovers what has happened to her. Like Simester and von Hirsch, Gardner and Shute believe criminalisation requires a wrong and that the terms of the Harm Principle must be met (they believe indeed that both tests are passed by their 'pure case'). As far as wrongfulness is concerned, Gardner and Shute's argument, I think, would lead them to endorse what I call above the Non-qualifying Thesis B*. For they believe that the wrongness of rape has *nothing* to do with harm and everything to do with the 'sheer use of another.' The wrongfulness constraint therefore is not for them going to be passed by any claim

criminalisation is a moralised one. They tell us that 'the criminal law has a communicative function which the civil law does not. It speaks with a distinctively moral voice, one that the civil law lacks' (4). It is a blaming institution, they tell us, one that must be astute to the appropriate objects of blame (23). Like Raz, they take the view that 'there is no fundamental principled inhibition on governments acting for *any* valid moral reason.' I have already cited their claim—one they assert is uncontroversial—couched explicitly in the language of *prima facie* reasons 'that something is bad supplies a prima facie reason to avoid its occurrence' for legislators as much as for individuals (143-144). Plainly criminalising Φing might be one way of 'avoid[ing] its occurrence.' If the wrongfulness of murder or rape provides no positive reason at all for criminalising them, it is difficult to see how the criminal law can really be the moralised, blaming institution that the authors claim it is.

Surely, then, the authors must be read as endorsing the much weaker Non-qualifying Thesis, B, as formulated above. The claim in this case is simply that there are kinds of wrongful Φing whose wrongfulness is insufficient to establish even a *pro tanto* ground for criminalisation. That as we have seen is consistent with there being (plenty of) kinds of wrongful Φing whose wrongfulness *is* sufficient to establish such a *pro tanto* ground for criminalisation. They then avoid the implausible implication that the wrongfulness of murder or rape is no sort of positive *pro tanto* reason for criminalising both. There are other points in the book where the weaker interpretation seems to be assumed. 'If,' they say, 'there are harm-based constraints on state intervention to regulate wrongs,' as of course they believe there are, 'they *complement* and do not displace the wrongfulness requirement' (21). A reading of this as requiring wrongfulness merely as a condition, rather than as an object of criminalisation would not be impossible, but it is more natural, I think, to read it as suggesting that wrongfulness can have an independent reason-giving pull.

As I have said, this is a thesis that is easy for the authors' legal moralist opponents to accept. The legal moralists can accept in other words that criminalisation requires (1) wrongfulness that is (2) subject to defeating conditions on a case-by-case basis so that (3) wrongfulness is insufficient for criminalisation and (4) only a subset (which may be a large subset—the size is to be determined) of moral wrongs provide *pro tanto* reasons for criminalisation. Finally, another point the authors make namely (5) that something can be wrongful *because* it is harmful (20) is also a claim that is in no way inconsistent with legal moralism. The key question then, which I consider in the remainder of the paper, regards the necessity or desirability of supplementing these conditions with a Harm Principle and/or an Offence Principle. Why in short if conduct is wrongful in the right way and able to

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that says rape is wrongful *because* it is harmful. In short I think they must believe that the sheer use of another, the mark for them of the wrongness of rape, gives a *pro tanto* positive reason for criminalisation, albeit one that is inconclusive because also subject to the Harm Principle. I comment on this argument in John Stanton-Ife, 'Horrific Crime,' in R.A. Duff, L. Farmer, S.E. Marshall, M. Renzo and V. Tadros (eds.), *The Boundaries of the Criminal Law* (2010), 138-162, at 149 et seq. See also Victor Tadros, 'Harm, Sovereignty and Prohibition,' *Legal Theory*, 17 (2011), 35–65.

overcome the range of 'defeaters' of the Insufficiency Thesis must it also be harmful or offensive-and-harmful in order to be legitimately criminalised?

IV. Offence

Should the criminal law be concerned with protecting people from being offended? And if so, is the concern so important that we should develop and support a dedicated *principle* of criminalisation in its name? The authors believe both questions should be answered in the affirmative and devote a large part—nearly a quarter—of the monograph to a defence of the Offence Principle (91-138). Their account, however, is heavily qualified and a significant measure of their energies goes into explaining the precise sense in which they support the Offence Principle. As we saw above the authors defend an Offence Principle that is independent of the Harm Principle, though they stop short of allowing that offence, entirely in the absence of harm, can legitimate the criminalisation of conduct. I therefore referred to it as semi-detached or semi-independent. They do allow, however, that the conditions on the requisite harm, when combined with relevant offence, can to an extent be relaxed by way of comparison with harm as a ground without offence. Therefore any verdict on the Offence Principle will ultimately depend on a verdict on the Harm Principle. I shall not, however, consider the latter until the next section.

In developing their own Offence Principle, Simester and von Hirsch use Feinberg's Offence, Principle as a foil. According to Feinberg:

> It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that is probably a necessary means to that end…[38]

Offence, for Feinberg, is an affront to sensibilities, a psychological experience that is unpleasant and disliked. The scope of Feinbergian offence is not, however, as wide as that statement might imply. A trivial affront or one that might only be a one-off would not be enough. The case for criminalisation on the basis of such affront to sensibilities would require that people are or may be caused to be offended in sufficiently large numbers and to a sufficient degree. For all that, Feinberg's equation of offence with affront to sensibility is, according to Simester and von Hirsch, the principal deficiency of his account. It leaves the scope of offence as a ground for criminalisation implausibly wide. It gives rise to what I will call an 'oversensitivity problem.' For the scope of what can affront the sensibilities of persons is potentially vast and offence can be taken unreasonably. Feinberg's account, the authors

[38] Feinberg, *Offense to Others*, Oxford University Press (1987), 1.

believe, is subject to a simple *reductio ad absurdum*: if enough people find Day-Glo ties upsetting, there would be a case for the criminal prohibition of the wearing in public of such ties (95).

What is needed to prevent the Offence Principle from being so seriously overbroad, say Simester and von Hirsch, is the provision of good enough *reasons* for holding that the defendant's conduct is offensive. The mere fact that offence is or may be taken by people is insufficient. The key question ought to be whether the state has *prima facie* reason to prohibit D from Φing. The very demand for reasons, they think, is the appropriate way to limit the potentially large scope of offence as a ground for criminalisation. What could give good enough reasons to turn affront into a valid ground for criminalising conduct? The authors stress again the requirement that criminalisation requires a wrong (95). To criminalise offensive conduct, they remind us, is to condemn that conduct through its proscription and the labelling of an offender as a wrongdoer. A plausible claim of wrongdoing is therefore needed. In the context of offensive conduct, the kinds of wrong in play are likely to involve conduct that is 'grossly inconsiderate or disrespectful' (106-107). Moreover, the authors suggest, 'People have a prima facie claim, grounded in human dignity, against intentional demeaning treatment,'(98) the violation of which can presumably be wrongful. However hot under the collar any number of people may get about the Day-Glo ties under the collars of some of their fellow citizens, the latters' conduct is not grossly inconsiderate or disrespectful or an affront to anyone's dignity, so there is no question of its being criminalised as far as the authors are concerned.

In other words by way of contrast with Feinberg the authors shift the emphasis of their Offence Principle from the psychological to the normative. No affront to sensibilities is pertinent to criminalisation unless it is backed up by appropriate reasons based on wrongdoing. It seems to me highly plausible to argue, as they do, that affront to sensibility, even affront to many sensibilities, is insufficient as a basis for legitimate criminalisation. What seems more dubious, as I will explain, is their apparent belief that affront to sensibility still has a significant role in criminalisation. Such an affront appears to be a necessary component in their Offence Principle. I will seek to make two points about the authors' treatment of offence, first that most of the heavy lifting in it is, so to speak, being done by wrongfulness, rather than offence. Secondly, that where distinctive work is being done by offence itself, it may be better that it is not done at all. Ultimately I suspect the authors' direction of travel away from Feinberg's 'psychological' notion of offence, towards a reasons-based, wrongfulness-based normative notion has the momentum to take their account to a place in which offence itself becomes unnecessary.

In order to make these points clear it will be useful to make a comparison. As far as the practical pay-off of their Offence Principle is concerned, the authors believe that it may be the best route to the justification of suitably specified and qualified offences based for example on insult and exhibitionism. Incitement to hatred—in particular racial hatred—is the most prominent example deployed by them of a kind of crime that may legitimately be criminalised under their Offence Principle. This makes for an interesting contrast with defences of the legitimacy of crimes of

incitement to hatred that are not based on offence. Jeremy Waldron, for example, has such a defence.[39] Waldron, like the authors, wishes to support the legitimacy of certain crimes of incitement to hatred, but his route to that result is, on its face, strongly at variance with theirs. It is not just that Waldron's defence is based on other factors than offence, so that we might yet seek to complement his argument for such laws with offence-based arguments. Wanting no such help, Waldron goes to some lengths to argue that his defence of the legitimacy of the relevant crimes *should not* be based on any offence they might cause. Waldron's defence of the incitement to hatred or 'hate speech' crimes in question is detailed and nuanced and I am not concerned to examine his view on its full merits. I will concentrate on the question of why he thinks a defender of such laws should eschew offence based support for her conclusion in the hope of casting some light on Simester and von Hirsch's views. As we will see, though the two parties' conclusions on the relevance of offence to the legitimate criminalisation of the relevant offences are diametrically opposed, it is not immediately obvious at what point of their reasoning they diverge from one another.

According to Waldron the existence of the relevant incitement to hatred crimes should be supported on the basis of the protection they afford to the dignity of persons. The protection of dignity, as we have seen, can also, for Simester and von Hirsch, be a basis for a wrong-making factor propelling offence into something that may be deserving of the protection of the criminal law. By a person's 'dignity' Waldron means 'a person's basic entitlements to be regarded as a member of society in good standing, as someone whose membership of a minority group does not disqualify him or her from ordinary social interaction.'[40] He does not mean 'dignity' in the sense of any particular level of self-esteem or honour. Offence, however deeply felt, is by contrast not, in Waldron's view, a proper object of legislative concern.[41] He concludes that to protect people from offence or from being offended (what he thinks we should not be doing) is to protect them from a certain sort of effect on their feelings, as opposed to protecting their dignity and the assurance of their decent treatment in society (which he says is what we should be doing).[42]

The protection of dignity, on the one hand, and the protection of persons from offence should be drawn in the following way:

> The distinction is in large part between objective and social aspects of a person's standing in society, on the one hand, and subjective aspects of feelings, including hurt, shock and anger, on the other. A person's dignity or reputation has to do with how things are with respect to them in society, not with how things feel to them. Or at least that is true in the first instance. Of course an assault on one's dignity will be felt as hurtful and debilitating. And no doubt those who assault another's dignity in this way will be hoping for certain psychological effects—hoping to cultivate among minority members a traumatic sense of not being trusted,

[39] Jeremy Waldron, *The Harm in Hate Speech*, Harvard University Press (2012).
[40] Waldron, *The Harm in Hate Speech*, 105.
[41] Waldron, *The Harm in Hate Speech*, 105.
[42] Waldron, *The Harm in Hate Speech*, 107.

> not being respected, not being perceived as worthy of ordinary citizenship, a sense of being always vulnerable to discriminatory and humiliating exclusions and insults. Those feelings will naturally accompany an assault on dignity, but they are not the root of the matter.[43]

I suggested above that it may turn out to be hard to point to a difference in substance between Simester and von Hirsch's views and those of Waldron despite their strongly contrasting conclusions on offence in relation to the relevant crimes of incitement. Simester and von Hirsch, after all, are unimpressed by the subjective aspects of feelings and so on of which Waldron speaks *alone*. For them such feelings only take on any significance for criminalisation when backed by wrongs, such as gross inconsideration, disrespect and so on. They even refer, as we have seen, to dignity itself in this context. In Waldron's terminology, the authors insist that the subjective must be supplemented by the objective to qualify for criminalisation. Is the difference, then, between Waldron on the one hand and Simester and von Hirsch on the other purely verbal? If so, this would bode rather badly for a separate Offence Principle. The constraint Simester and von Hirsch adopted to repair the flaw they identified in Feinberg's theory may have swallowed up the Principle entirely

It is not, however, right to think that the difference is merely verbal. The two views do, it is true, coincide on what I above called the *oversensitivity* issue. That someone's sensitivities are affronted, without more, is not enough on either Waldron's or on the authors' accounts to get a case for criminalisation going. The two views come apart, however, in what might be called the '*undersensitivity'* case. This is the sort of case in which there is good reason for someone to be offended or resentful and genuine wrongdoing is in play but the victim simply does not feel affronted in any relevant way. As I understand him, Waldron would say it is neither here nor there that a person does not *feel* affronted: he should still receive the relevant protection. Simester and von Hirsch's Offence Principle by contrast would not as I understand it offer protection here. Consider an example from *Woods*, a case in English law.[44] A black nightclub doorman was punched in the head by the defendant and called a 'black bastard.' The doorman testified that he was 'not bothered' by what he had been called, just by the fact of the physical assault. The magistrates, taking into account how the victim perceived the comments concluded that this assault was not a racially aggravated one: the victim 'made no play (at any stage) of the words being racially offensive and said he was not bothered by such comments.' The Administrative Court later reversed the decision. The magistrates, it said, were wrong to set such store by the victim's perception of the words directed at him. The victim's personality was such that he was resilient or broad-shouldered. That, the Court decided, was irrelevant to the question of whether the assault was racially aggravated.

Neither Waldron nor the authors are explicitly concerned with crimes of the sort charged in *Woods*, that is base crimes like assault that are aggravated because they manifest or are motivated by certain kinds of hatred and I do not mean to ascribe any view to either party on the legitimacy of such

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[43] Waldron, *The Harm in Hate Speech*, 107.
[44] *DPP v Woods* [2002] EWHC 85 (Admin).

offences. It would seem, however, that whatever the implications of this, the doorman's *dignity* has surely been violated on Waldron's account, irrespective of whether the doorman's *sensibilities* were affronted by the racist remark. So there does appear to be a difference of substance between Waldron and the authors. The difference appears to be this. For Simester and von Hirsch, subjective feelings, affronts to sensibilities are insufficient of themselves to trigger their Offence Principle. But such affronts to sensibilities are apparently necessary. For them the psychological aspect without the normative aspect is thus insufficient; similarly the *normative aspect without the psychological aspect* is also insufficient to trigger the principle. On Waldron's dignitarian view, affronts to sensibilities are insufficient to trigger the protection of the criminal law, but they are also not necessary. As with the authors, for Waldron the psychological aspect without the normative aspect is insufficient, but unlike them the normative aspect for him does not require the psychological aspect.

If I am right that there is at least this difference between the bases on which Simester and von Hirsch on the one hand and Waldron on the other seek to defend the legitimacy of certain incitement to hatred crimes so that the difference between them is not merely verbal, that raises the question of which is the better view. Where there is a wrong, where someone has good reason to feel affronted, but because she is stoical or robust she does not, that strikes me as an insufficient basis for withdrawing the protection that someone of ordinary sensibilities would get. Avishai Margalit, writing about the notion of humiliation in the political context makes a point with the same structure. He suggests that humiliation in the political context should be conceived as 'any sort of behaviour or condition that constitutes a sound reason for a person to consider his or her self-respect injured.'[45] He formulates the idea in this way in order to emphasise that his idea is normative in nature, not psychological. As he explains 'on the one hand, the normative sense does not entail that the person who has been provided with a sound reason for feeling humiliated actually feels that way. On the other hand, the psychological sense of humiliation does not entail that the person who feels humiliated has a sound reason for this feeling. The emphasis is on *reasons* for feeling humiliation as a result of others' behaviour.'[46]

Perhaps an analogous point is also evident in the altogether different context of debates about distributive justice. In the relevant literature two characters are discussed. Tiny Tim has severe disabilities but is unusually stoical and has a sunny disposition. Louis, by contrast, has expensive tastes and needs 'pre-phylloxera claret and plovers' eggs if he is to have a high enough level of psychological happiness.[47] Ronald Dworkin argues that Louis should not be compensated for his expensive tastes, on the one hand, and Tiny Tim should not be denied equal resources because his psychological welfare is already relatively high. Similarly—and I take this to be consistent with Waldron's position—that someone with very good reason to believe or feel that her dignity under the

[45] Avishai Margalit, *The Decent Society*, Harvard University Press (1996), 9.
[46] Margalit, *The Decent Society*, 9.
[47] Ronald Dworkin, *Sovereign Virtue*, 48-62.

relevant conditions has been compromised should not lose the protection given to persons who react in a statistically normal way, due to their failing to feel affronted as a result of their own forbearing nature.

I believe that the authors are right to reject Feinberg's Offence Principle because it is an overly psychological account. To fix the problem, they buttress the offence requirement, understood psychologically, with normatively significant reasons. I have suggested that once this shift from the psychological to the normative has taken place, the normative essentially takes over. In their concluding remarks on offence the authors write 'We have suggested a general standard of when the offence becomes a wrong, one that relates to the conduct's showing a manifest lack of respect or consideration for others.'(137) This suggests the question: why not excise offence altogether and focus simply on the manifest lack of respect or consideration for others or the dignity notion they elsewhere support? For these are the notions that are doing the justificatory work. As we have seen, what stands in the way of this revision is the authors' apparent belief that the psychological aspect of offence, while insufficient to trigger their principle of criminalisation, is necessary. I have suggested that this has the unwelcome consequence that the protection of the dignity of persons, or the protection of persons from manifest lack of respect or consideration is lost if the person in question has certain virtues of forbearance or stoicism. The legal moralist, by contrast would simply ask in any given case whether the conduct under consideration is wrongful, is the sort of wrong that should concern the criminal law and whether any number of the range of defeaters we encountered under the Insufficiency Thesis stand in the way. It is unclear to me that any significant advantage lies with endorsing the Offence Principle instead. Anything one says about the authors' Offence Principle is provisional, however, because it remains subject to their Harm Principle, to which I turn in the next section.

To summarise, then, given the authors reject legal moralism, I have been concerned with the question of what makes the difference between a broadly conceived legal moralist account and the authors' own account centred on the Harm Principle and the Offence Principle. Legal moralism has wrongfulness at its heart and can be seen as a broad position constituted by what the authors call the Necessity Thesis, together with the assemblage of defeaters that make up the Non-sufficiency Thesis, together with a Non-qualifying Thesis. I suggested that it is open to the legal moralist to endorse what I called Non-qualifying Thesis B, but not Non-qualifying Thesis A. I also suggested that the authors' own position is best interpreted in accordance with Non-qualifying Thesis B, rather than A. I suspect that most of the excellent discussion of various contexts of criminalisation to be found in the authors' work needs no further assumptions at this base level. As far as paternalism is concerned, as we noted early on, the authors depart from Mill and Feinberg in asserting no principled block on criminalisation on such grounds. Instead they consider the legitimacy of paternalist criminalisation on a case-by-case basis, armed with some helpful generalisations of the kind we encountered in our discussion of the

Insufficiency Thesis, in the event usually rejecting criminalisation on this basis. This already conforms to the broad legal moralist understanding to which I have just alluded.

As far as offence is concerned, the authors' stated position is not similarly compatible with legal moralism. But I have suggested that it is far from clear that their Offence Principle is either necessary or desirable. Its necessity is called into question by the fact that, on the authors' account, the essential normative work is being done by wrongfulness anyway. Why not simply discuss the relevant issues as questions about the wrongfulness constraint on criminalisation and about potential defeating conditions? Its desirability is called into question by the fact that where offence itself—as a psychological notion—is making a distinctive contribution to the account, it is perhaps better that it not do so.[48]

Among leading liberal defenders in the Harm Principle tradition, we have seen that there is no consensus on the possibility of legitimate paternalist criminalisation—Mill and Feinberg say no; Raz and Simester and von Hirsch say yes—or on offence—Mill says no, Feinberg says yes, with Simester and von Hirsch closer to Feinberg but lying somewhere in between the two. However, on the question of the exclusion of moralism, all defenders of the Harm Principle are as one. In coming finally to the authors' Harm Principle, I will be especially interested in that question of the exclusion of moralism.

V. Harm and the Exclusion of Moralism

I have used the word 'harm' above without saying what I or what the authors mean by it. The ordinary usage of the term 'harm' has a large area of vagueness.[49] I take it that there is a rough, commonly understood intuitive use of the term that is readily understandable for most purposes, despite this vagueness and indeterminacy. When one comes to the Harm Principle itself, we need to get more precise, since the question 'to criminalise or not to criminalise' is to turn on what we mean by harm. According to Raz, 'without… a connection to a moral theory the harm principle is a formal principle lacking specific concrete content and leading to no policy conclusions.'[50] He himself understands 'harm' in terms of the setback to or denial of autonomy and adds 'people who deny the moral value of autonomy will not be committed to denying that there are harms, nor that harming people is, as such, wrong. But they would have to provide a different understanding of what behaviour harms others.'[51] In other words, for something of the potential practical importance of the definition of 'harm' in the

[48] Grant Lamond suggested to me that one might take (psychological) offence as a good barometer for determining whether the conduct that caused it ought to be criminalised. I agree that quite possibly it should. However, I take it Simester and von Hirsch have in mind something much stronger for their Offence Principle than this evidentiary role.

[49] Joel Feinberg, *Harm to Others*, 65.

[50] Raz, *The Morality of Freedom,* 414.

[51] Raz, *The Morality of Freedom,* 414.

Harm Principle, there are at least two constraints. The definition must make at least some clear sense of the pre-theoretical, rough intuitive sense of harm, but also requires a measure of stipulation that should itself be based in part on good moral grounds.[52]

This creates a danger. To make it clear, let me start by putting it in a caricatured, quasi-Machiavellian way. 'First, decide on your conclusion as regards specific conduct that is wrongful or immoral. Do you want it criminalised? If so, make sure that you have defined 'harm' in such a way that this wrongful conduct counts as harmful. Neglecting that step could be fatal to your aim of criminalising the conduct. For then, you will find your proposed new crime blocked because it is "merely immoral" and does not violate the Harm Principle.' Plainly no defender of the Harm Principle is involved in anything so crass or deceptive. But the authors themselves allude to a more real danger, one in their view that Feinberg has failed to avert.

According to Feinberg, as they note, a landowner is 'harmed' by a trespasser who takes 'one quiet and unobserved step' onto his land.[53] 'Harm' according to Feinberg is a setback to interests, while interests are 'those things in which one has a stake.'[54] The landowner has an interest in 'the exclusive enjoyment and possession of his land' and it is that interest that is set back by the tiny step onto his land. No other interest of the landowner's need be affected in order for us to conclude that he is harmed in Feinberg's sense; indeed Feinberg adds that even if this tiny step somehow redounded to the landowner's favour, he would still have been harmed by it. The authors object that this analysis collapses the distinction between harms and wrongs 'since individuals can always be said to have an interest in not being wronged.'(50) The trespasser's quiet and unobserved step onto the landowner's property does not, in their view, harm him. In more detail they argue:

> The very reason why bare trespass is a difficult case is that the wrongdoer's action violates the landowner's right but causes no actual harm. To hold otherwise would be to make a merely formal move, modifying our conception of harm within the Harm Principle in order to include bare right-violations, and thereby disguising without dissolving the problem posed by harmless wrongdoing (50-51).

What is the authors' account, then, of harm and does it avoid the danger of 'disguising without dissolving the problem posed by harmless wrongdoing?' The authors' most oft-repeated criterion for what counts as harm is *that which affects people's lives*. In their words: 'The state has an interest in regulating conduct that affects [people's] lives. Pure moral wrongs fall outside its remit.'(30) They also cite approvingly Feinberg's understanding of harm as set back to interests, which they gloss in terms of 'well-being' and as a 'diminution of the kinds of things that make one's life go well' (36); as well as Raz's understanding of harm in terms of setbacks to autonomy (37). Beyond insisting on

[52] I briefly consider some possible meanings of harm, such as 'prospect harm,' 'dignitary harm' and 'experiential harm' in John Stanton-Ife, 'Horrific Crime', in R.A. Duff, L. Farmer, S.E. Marshall, M. Renzo and V. Tadros (eds.), *The Boundaries of Criminal Law*, Oxford University Press, (2010), 138, 159-160.
[53] Feinberg, *Harm to Others*, 107.
[54] Feinberg, *Harm to Others*, 33.

attention to people's lives and endorsing on this point both Feinberg and Raz, the authors stress the importance of a person's 'resources' to their understanding of harm. We should understand harms, they say, 'characteristically' in terms of the impairment of people's resources. This emphasises the longer-term means or capabilities making up people's interests, the assets they have in life: 'those things that one can rely upon to sustain or enhance well-being' (37). As far as I can see these three understandings of harm—as setbacks to interest, as setbacks to autonomy and as impairment of resources—are for the authors each individually sufficient to constitute harm. There is no suggestion that all three must be jointly realised in order that someone is harmed.

To focus on one part of this understanding what else, one might ask, is a relevant *resource*, so that an impairment of it harms the person whose resource it is? First, let us see in more detail how the authors' understand their idea of resources. It is made up, they say, of at least three features:

> First, [resources] tend to subsist over a longer term. An individual's personal belongings, her state of good health, or her good reputation, can constitute resources. The avoidance of momentary irritation or affront does not. Secondly, they typically affect or are capable of affecting the quality of a person's life; the opportunities that she has for well-being. Property interests, for example, are resources just because they can help to satisfy a person's material needs and preferences. Thirdly, they have an objective dimension, in as much as the existence of a resource is ordinarily independent of a person's consciousness. A resource may be tangible or intangible (cf. intellectual property), but it must be something which can be impaired without the person's being aware of it at the time. Contrast, for example, defamation with offensive conduct. A person may be defamed behind his back and thus harmed, because his interest in good reputation remains an important resource; this holds even if he is unaware that his good name is being denigrated. But he cannot be offended unawares (37).

What, we might ask, of the ancient thesis that 'the virtues benefit their possessors'?[55] And, pertinently for the criminal law, what of the corresponding thesis that the vices and absence of virtues harm them? Is a good, virtuous, character 'a resource,' on the authors' account, so that one is harmed more and more, as one's character deteriorates? It would seem so. Certainly, a good character is something that parents generally want for their children. And importantly this is thought to be *good for* our children, not just good period or good in order to give us, the parents, a quiet life. Parents in general want their children, for their children's sake, to be honest rather than to be skilled liars. It does not seem, therefore, in any way difficult to reconcile the suggestion that a good character is a resource with the authors' suggested 'three features' of resources just cited above.[56] A character subsists over a longer-term, it typically affects or is capable of affecting the quality of a person's life and this is why parents—who as parents care about their children, rather than the general good or themselves—are so

[55] See, for example, Rosalind Hursthouse, *On Virtue Ethics* Oxford (1999), 163-192.
[56] See also Julia Annas, *Intelligent Virtue*, Oxford (2011) likening virtues to skills.

concerned that their children should have good characters; and one can be ignorant about one's true character or aspects of it. A good character is not of course a tangible resource, in the sense that, say, a car is, but the same is true of a good reputation, which as we have seen the authors themselves count as a resource. If a good character is a resource, it would seem the path is clear for the possibility that one can be harmed as one's character deteriorates or fails to develop. 'Harm' will accordingly include what has been called 'moral harm': people can be harmed because corrupted.[57] There may be scope for a similar analysis in relation to the degrading of people, but I will not consider that here.

It might immediately be said in response, that the problem I am trying to start sketching for the authors' rejection of pure wrongdoing or immorality as a ground for criminalisation is simply irrelevant. For even if someone can be harmed by a deterioration of their character or harmed because corrupted or degraded, this only suggests a *paternalist* ground for criminalisation, not a ground based on pure wrongdoing or immorality. And the authors as we saw earlier do not rule out paternalism as a principled ground for criminalisation. I will return to that point below. But first I should note that the idea that there can be moral harm or that a corrupted person is to that extent a harmed person is not uncontroversial. Many utilitarians would reject it.[58] Feinberg, whose underlying normative theory seems to be intuitionist rather than utilitarian also rejects the idea. 'Morally corrupting a person, that is, causing him to be a worse person than he would otherwise be, can *harm* him,' Feinberg claims, 'only if he has an antecedent interest in being good.'[59] Plainly the success of this conclusion depends on its being the case that not everyone has an interest in 'being good' as Feinberg puts it. Feinberg reaches this conclusion on the basis of his reading of 'interest' as a 'want-regarding' concept. Briefly Feinberg tells us, following Brian Barry, a 'want-regarding' concept can be analysed entirely in terms of the 'wants which people happen to have.' It is contrasted with 'ideal-regarding' concepts. A concept is ideal-regarding if reference must also be made to what would be ideal, or best for people, their wants notwithstanding, or to the wants they ought to have whether they have them in fact or not.[60] Since Feinberg's notion of 'interests' is want-regarding a space opens up for him between what a person's interests *are*—which turn in the final analysis on their wants—and what their interests *ought to be*. Hence, only some people, roughly those with the right 'wants' have an interest in a good character.

I raise this here not to try to resolve this enormous question, which would ultimately take us to the depths of the questions both of how we should understand well-being and of what role wants and desires should have in practical reasoning itself. Rather I raise it in order to state my (admittedly speculative) belief that the utilitarian or Feinbergian answers to the problem of moral harm are unlikely to recommend themselves to the authors. Very roughly, we have a divide between the

[57] Feinberg, *Harm to Others*, 65-70.
[58] For example, Brad Hooker, 'Does Moral Virtue Constitute a Benefit to the Possessor?' in R. Crisp (ed.) *How Should One Live?* Oxford (1996); L.W. Sumner, *The Hateful and the Obscene*, Toronto (2004), 35-50.
[59] Feinberg, *Harm to Others,* 70.
[60] Feinberg, *Harm to Others*, 67.

ancients on this question, who in various ways accept that there can be moral harm, and the utilitarians or Feinbergian intuitionists, who deny this. Simester and von Hirsch eschew utilitarianism and, as we have seen, endorse in various places the liberal perfectionism of Raz, who in turn sees his account of well-being as broadly Aristotelian. This at least makes it unlikely that they would want to avail themselves of any attempts at the dissolution of 'moral harm' based on utilitarian or 'want-regarding' premises. There might perhaps be other kinds of argument to the same end, but part of my point is to ask what such an argument would look like.[61] Some sort of understanding of well-being showing how such 'moral harm' can be excluded is required by the authors and if utilitarian or Feinbergian solutions are based on questionable assumptions about well-being, what would an alternative solution look like?

It strikes me, then, that the authors have not done anything to block such a wide reading of 'harm.' Could it be that they do not actually wish to exclude 'moral harm' from their understanding of harm? They do at one point in the book refer to 'corruption' as a justification for criminalisation. They consider the House of Lords decision in *Brown*.[62] In this well known case, the infliction of minor bodily harm on another, fully consenting, person was held to constitute an offence where the means involved sadomasochistic sexual activity. The authors cite Lord Jauncey's justification for this conclusion, asserting that the legalisation of such activities might encourage the seduction and 'corruption of young men.' In response the authors say:

> But would it? It is an easy claim to make when no supporting data is offered. Given the presumption against criminalisation, the onus is on its proponents to supply evidence that creating a new offence will help to prevent harm from occurring (36).

They make a good point against Lord Jauncey's alleged justification. The onus is surely indeed on the proponent of specific criminalisation to supply the evidence. Assuming, by contrast, that the onus to supply the criterion of harm is on the theorist, the authors might here be taken to imply that there is nothing wrong with 'corruption' of another *as such a harm*, only that Lord Jauncey's justification is far too weak because it offers no evidence and it fails to explain why consenting young men (I take it this means young men and not minors) *would be* corrupted by engaging in more of the conduct in question. In other words the problem alluded to in *Brown* is not that corruption is not harmful, but that no evidence was on offer that anyone was corrupted. However, this short passage is ultimately insufficient to tell us one way or another whether they would actually endorse 'moral harm' as harm.

Possibly one could go further. Earlier we noted the authors' observation that 'individuals can always be said to have an interest in not being wronged.' (50) They also expressed their doubts that

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[61] One must again point out that Raz , like the authors, is himself a defender of the Harm Principle, notwithstanding his Liberal Perfectionism and broadly Aristotelian understanding of well-being. See footnote 18 above.

[62] *Brown* [1994] 1 AC 212.

the Harm Principle could get off the ground under such an assumption. Whether there is such an interest depends on an account of well-being. If there is such an interest, it in turn needs to be accounted for in any version of the Harm Principle. One likewise needs to consider whether individuals have an interest in not *wronging* others? A setback to interests as we have seen also counts as harm for the authors. Might simply perpetrating wrongdoing setback someone's interests? Here I am thinking of one-off wrongful conduct as opposed to the damage over time to someone's character we have just been considering. Might it simply be that doing wrong harms the perpetrator of the wrongdoing, as well as harms the victim? Rapists harm their victims and our sympathies are rightly with their victims, not the perpetrators. It strikes me as plausible intuitively to suggest that a rapist is, however, also harmed (that is, inflicts harm on himself) in a way that is not simply reducible to the harm of getting caught or punished or, as the case may be, suffering intense feelings of guilt. Plainly this does not lead one to sympathise with the perpetrator, or if it does, it does only in some way that is utterly different and secondary to how one sympathises with the victim. Intuitively, however, it seems to me there is also a self-harm to the perpetrator here. To try to make sense of this, one might ask what it means for something to be *bad for* someone, as opposed to being simply bad? According to Raz something is 'good for' any agent if we show (a) that the thing is good, and (b) that the agent has the ability and the opportunity to have that good.[63] Presumably, the analysis will work the other way around for what is bad for, as well as good for, a person. Hence something is bad for a person if it is (a) bad and (b) the person has the ability and the opportunity to have or engage in or suffer the bad.[64] Obviously good or bad acts being respectively good or bad *for* persons in this way are not good or bad for their authors in the *same* way the acts are good for their beneficiaries or bad for their victims. That is, they are not good or bad for their authors (largely) instrumentally.[65]

If it is true that someone can be harmed in the moral senses I have mentioned, either by wronging another or through the deterioration of their characters, we are certainly left with a very wide notion of harm. I do not see anything, as I have said, in the authors' account of harm to block this. Such moral harm emphatically concerns 'people's lives.' We should turn, however, to the potential reply to this point I floated earlier. The reply, it will be remembered, was that even if it is true that harm stretches to these forms of moral harm on the authors' account, that is not a problem for them, as opposed to the anti-paternalist versions of the Harm Principle of Feinberg and Mill. For the authors do not build anti-paternalism into their Harm Principle. Harm to someone's character or to someone on the basis of his or her wrongdoing could well be, for the authors, a *pro tanto* paternalist reason for criminalisation. Whether criminalisation should be the all-things-considered verdict is

[63] Joseph Raz, 'On the Moral Point of View,' in his *Engaging Reason: On the Theory and Value of Action,* Oxford University Press (1999), 247 at 260.
[64] Raz, 'On the Moral Point of View,' 260.
[65] R. Jay Wallace, 'The Rightness of Acts and Goodness of Lives,' in his *Normativity and the Will*, Oxford University Press (2006), 300, 302.

simply to be evaluated on a case-by-case basis. The authors are by contrast seeking to exclude justifications based on pure wrongdoing or pure immorality. And that is different.

Formally speaking the point is correct. However, as Feinberg saw, moralism and paternalism can be formulated in such a way that the overlap between them can be very considerable, possibly even near-total. For any genuine claim of pure moralism or pure wrongdoing, will be ruled as a harm, if only it can be said to be bad for the actor or the person whose character is in question. Feinberg therefore formulated (and of course rejected) what he called 'Moralistic Legal Paternalism' which he defined thus:

> Moralistic Legal Paternalism (where paternalism and moralism overlap via the dubious notion of "moral harm"): It is always a good reason in support of a proposed prohibition that it is probably necessary to prevent *moral harm* (as opposed to physical, psychological, or economic harm) to the actor himself. Moral harm is "harm to one's character," "becoming a worse person," as opposed to one's body, psyche or purse.[66]

Feinberg as we have seen sought to fight off such a ground for criminalisation through his rejection of paternalism and rejection of moral harm. Utilitarians similarly have tools for understanding well-being in such a way as to rule out moral harms of both the kinds I have considered. If, for example, we reduce well-being to preferences or on hedonistic grounds to mental states, it will be straightforward to exclude moral harm.[67] The remorseless wrongdoer who 'gets away with it' or the person whose character deteriorates to comprehensive viciousness are not harmed on such reductive accounts. I have already speculated, however, that these strategies would not appeal to Simester and von Hirsch in the light of their other commitments. They are in need, I believe, of an account of well-being able to show how such widespread moralism can be kept out of the back door route via paternalism. Without such an account it is hard to see how their Harm Principle can have anything like the necessary cutting edge to do its basic job of excluding justifications based purely on wrongdoing or immorality, while not excluding at a principled level, harm-based, including paternalist, justifications. Without such an account the problem posed by harmless wrongdoing will appear to have been disguised without having been dissolved. It will not be at all clear what the Harm Principle is for.

VI. Conclusion

Notwithstanding the authors' rejection of legal moralism, one could, I have suggested, block out a broad version of legal moralism from the authors' three theses on wrongfulness. Their Necessity

[66] Joel Feinberg, *Harm to Others*, Oxford University Press (1984), 27.

[67] See also the sophisticated, though still subjectivist, account of well-being in L.W. Sumner, *Welfare, Happiness and Ethics*, Oxford University Press (1996).

Thesis establishes the need for a wrong. Their Insufficiency Thesis establishes the need to take into account an array of potential 'defeaters.' Their Non-qualifying Thesis, at least if understood as what I called 'Thesis B' as opposed to 'Thesis A,' shows the need to discriminate between types of wrongfulness. Only certain kinds of wrongfulness will provide *pro tanto* reasons for criminalisation, but such reasons there will be. I have not examined the authors' impressive work blocking out 'mediating principles' for the Harm and Offence Principles. That is because I have been concerned with the prior question of whether those principles are sufficiently motivated or justified by the authors in the first place. I very much doubt that they have been. However, I believe much of the authors' work on such mediating principles can be profitably and comfortably fitted into the sort of legal moralist account just described, particularly into the Insufficiency Thesis. What I have doubted is that there is enough reason to take the step or two beyond such a legal moralist account into a vindication of the Harm and Offence Principles. The authors' own views on paternalism already conform to such a legal moralist picture. As far as the authors' Offence Principle is concerned, I have argued that the authors' 'normativist turn' away from Feinberg's understanding of offence, has the result that most of the justificatory work is being done by wrongfulness rather than offence. I also suggested that what work is being done on the authors' Offence Principle by (psychological) offence is perhaps best not done. As far as the Harm Principle itself is concerned, it is to the authors' credit that they do seek to define what they mean by 'harm.' Too often proponents of the Harm Principle think it sufficient to do no more than rely on an intuitive understanding of harm, as if that were determinate or uncontroversial enough. However, I have argued that as it stands the authors' understanding of harm lacks the resources necessary to divide harm-based, including paternalist, justifications from purely wrong-based or immorality-based justifications.

Simester and von Hirsch convincingly demonstrate the importance of wrongfulness to legitimate criminalisation. To my mind, however, their own Harm and Offence Principles are victims of this success. It could be that the two traditions of thought about legitimate criminalisation, based respectively on the Harm Principle and legal moralism are gradually beginning to merge into one. Alternatively, such a conclusion may be premature. But if the Harm Principle is to maintain its high status in such debates, far more attention is necessary, I believe, to the question of what harm is and how that relates to what is good for someone as opposed to being simply good, in short to a developed understanding of well-being.

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